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No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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58 pp

QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?

PARTIES

The parties are identified correctly in the Petition, Pet. at ii, as clarified in the Brief in Opposition, Opp. at ii.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vii

ABBREVIATIONS KEY xi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 2

1. Statement of Facts 2

   a. The Promise Scholarship Program 2

   b. Joshua Davey as Promise Scholar 3

   c. The State's Disqualification of Davey 5

   d. The Scope of the States' Disqualification of Theology Majors 6

2. Course of Proceedings 11

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THEOLOGY MAJORS VIOLATES THE FREE EXERCISE CLAUSE. 18

A. Washington Has Created a Religious Gerrymander. 18

1. The religious discrimination is explicit. 19

2. The state's profession of an innocent motive is irrelevant. 20

3. Davey's ability to overcome or circumvent the discrimination is irrelevant. 21

B. Washington's Anti-religious Discrimination Fails Strict Scrutiny. 24

1. No compelling state interest justifies the state's anti-religious discrimination. 25

a. Compliance with state constitution 26

b. Protection of taxpayer conscience 27

2. The anti-religious discrimination is not narrowly tailored to the asserted state interests. 30

II. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THOSE WHO DECLARE MAJORS IN THEOLOGY TAUGHT FROM A RELIGIOUS VIEWPOINT VIOLATES THE FREE SPEECH CLAUSE. 33

A. The First Amendment Protects Religious Speech, Including Instruction, Against Viewpoint Discrimination. 33

B. Rosenberger Controls this Case. 35

C. The Rules for Government Speech Do Not Shelter Washington's Discrimination Against Private Speech. 37

III. THE STATE'S RECOURSE TO INAPPOSITE LINES OF CASES IS MERITLESS. 38

A. The "Decline-to-Fund" Cases are Inapposite. 38

B. The Doctrine of Unconstitutional Conditions Leads to the Same Result. 41

IV. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THEOLOGY MAJORS VIOLATES THE ESTABLISHMENT CLAUSE. 42

V. THE STATE'S DISCRIMINATORY TREATMENT OF THEOLOGY MAJORS VIOLATES THE EQUAL PROTECTION CLAUSE. 44

CONCLUSION 45

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 40

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 29, 37, 42, 43

Board of Regents v. Southworth, 529 U.S. 217 (2000) 28

Capitol Square Review and Advisory Bd. v. Pinette, 514 U.S. 753 (1995) 34

Carey v. Brown, 447 U.S. 455 (1980) 45

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) . . . . . 13, *passim*

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 44

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 44

Clark v. Jeter, 486 U.S. 456 (1988) 44

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 34

Employment Division v. Smith, 494 U.S. 872 (1990) 18, 19, 24

Everson v. Board of Educ., 330 U.S. 1 (1947) 42

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 34, 36, 37

Grutter v. Bollinger, 123 S. Ct. 2325 (2003) 45

Harris v. McRae, 448 U.S. 297 (1980) 38, 39

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 27

Lamb's Chapel v. Center Moriches Union Free
School Dist., 508 U.S. 384 (1993) 34, 36, 37

Lemon v. Kurtzman, 403 U.S. 602 (1971) 42

Locke v. Davey, 123 S. Ct. 2075 (2003) 14

Maher v. Roe, 432 U.S. 464 (1977) 38, 39

McDaniel v. Paty, 435 U.S. 618 (1978) ..... 13, *passim*

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) 23

Mitchell v. Helms, 530 U.S. 793 (2000) 20, 35, 40

Mueller v. Allen, 463 U.S. 388 (1983) 40

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 39

Norwood v. Harrison, 413 U.S. 455 (1973) ... 20, 24, 31, 40

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 33

Police Dep't v. Mosley, 408 U.S. 92 (1972) 45

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 26

RAV v. City of St. Paul, 505 U.S. 377 (1992) 45

Regan v. Taxation With Representation,
461 U.S. 540 (1983) 38, 39

Rosenberger v. Rectors and Visitors of Univ.
of Va., 515 U.S. 819 (1995) 16, 34, 35, 37

Rust v. Sullivan, 500 U.S. 173 (1991) 37, 38, 39

Schneider v. State, 308 U.S. 147 (1930) 23

Sherbert v. Verner, 374 U.S. 398 (1963) 22

Speiser v. Randall, 357 U.S. 513 (1958) 41

United States v. American Library Ass'n,
123 S. Ct. 2297 (2003) 39, 40

Virginia State Board of Pharmacy v. Virginia
Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 36

Wheeler v. Barrera, 417 U.S. 402 (1974) 32

Widmar v. Vincent, 454 U.S. 263 (1981) ..... 13, *passim*

Witters v. State Commission for the Blind,
112 Wash. 2d 363, 771 P.2d 1119,
cert. denied, 493 U.S. 850 (1989) 26

Witters v. Washington Dep't of Servs. for the Blind,
474 U.S. 481 (1986) 17, 29, 36, 40

Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) 14, 20, 40

Zobrest v. Catalina Foothills School Dist.,
509 U.S. 1 (1993) 40

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. VI, cl. 2 ..... 26, 27

U.S. Const. amend. I. ..... i, *passim*

U.S. Const. amend. XIV ..... i, *passim*

Wash. Const. art. I, § 11 32

1999 Wash. Laws ch. 309, § 611 ..... 3, 7

Wash. Rev. Code § 28B.10.814 ..... 7, 9, 19, 26

Wash. Rev. Code § 28B.119.010 ..... 3, 7, 26

WAC 250-80-010 3

WAC 250-80-020 ..... 3, 7, 19, 26

WAC 250-80-060 ..... 3, 29

WAC 250-80-070 3

WAC 250-80-100 ..... 8, 29, 43

OTHER AUTHORITIES

2 Maccabees 6:18-31, 7:1-42 21

ABBREVIATIONS KEY

ER	Excerpts of Record (9th Cir.)
JA	Joint Appendix
Opp.	Brief in Opposition
Pet.	Petition for Writ of Certiorari
Pet. App.	Appendix to the Petition
Pet. Br.	Brief for the Petitioners
SER	Supplemental Excerpts of Record (9th Cir.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution provide as follows:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The pertinent provisions of the Washington state constitution and state statutes and regulations are set forth in the Brief for Petitioners, the Petition, and the Joint Appendix. *See* Pet. Br. at 1-2; Pet. App. 88a-106a; JA 178-87.

INTRODUCTION

The State of Washington awarded respondent Joshua Davey a Promise Scholarship based on financial need and academic achievement. The state permits Promise Scholars to use this scholarship to defray educational expenses -- including room and board -- for the first two years of *any* course of study at *any* accredited college in Washington *except* if the recipient declares a major in theology taught from a religious perspective. When Davey declared a double major in Pastoral Ministries and Business Management and Administration, state law disqualified him from receipt of his Promise Scholarship.

The Ninth Circuit in this case correctly held that this explicitly anti-religious, viewpoint-based discrimination violates the Free Exercise Clause of the First Amendment (as incorporated through the Fourteenth Amendment) to the U.S. Constitution, and that no state constitutional provision or statute justifies that federal constitutional violation. This Court should affirm that judgment.

STATEMENT OF THE CASE

1. Statement of Facts

The essential facts of this case are undisputed. JA 76; Pet. App. 52a.

a. The Promise Scholarship Program

In 1999, the State of Washington created the Promise Scholarship program designed to assist financially needy, academically gifted high school graduates who attend college in Washington. Pet. Br. at 6-7; JA 50-51, 180. As defendant Governor Gary Locke explained, Promise Scholarships are designed to "help ease the financial burden" of "the costs associated with college," JA 55.

Students who win Promise Scholarships may use them at "any

accredited institution within the borders of the state." Wash. Admin. Code [WAC] 250-80-010 (JA 178). This includes both state schools and accredited private colleges and universities. WAC 250-80-020(13) (JA 180-81). For students attending private institutions, the Promise Scholarship award is made payable to the student, WAC 250-80-060(4) (JA 184), not to the school, JA 58. The award check or "warrant" is sent to the student's college solely for verification of enrollment and for disbursement to the student. JA 55, 58, 184. The student may then use the scholarship funds for any "college-related expenses, including but not limited to, tuition, room and board, books, materials, and transportation." 1999 Wash. Laws ch. 309, § 611(6)(i)(vii) (Ex. 4 to Aff. of Michael J. Shinn in Support of Defendants' Motion for Summary Judgment) (ER[1] 38, p. 52) (legislative appropriation establishing Promise Scholarship program). *Accord* JA 7 (¶ 22) (Verified Complaint), 27 (¶ 22) (Answer). *See also* Wash. Rev. Code § 28B.119.010(7) (Pet. App. 94a) (statutory adoption of rule).

The Promise Scholarships were worth $1,125 for the 1999-2000 academic year, JA 55, 76, and $1,542 for the 2000-01 academic year, JA 95, 175. A Promise Scholarship is only available for the first two years of a student's college education. WAC 250-80-010 (JA 178), 250-80-070(1), (4) (JA 185).

b. Joshua Davey as Promise Scholar

Respondent Joshua Davey is a Christian committed, in his words, to "living out my faith in every aspect of my life." JA 40.

> I believe that the Bible teaches that all Christians are to serve God throughout their lives. For me, this means expressing my faith through full-time service in the ministry. Because of this religious belief, I have planned for many years to attend

[1] "ER" refers to the Excerpts of Record in the Ninth Circuit.

> a Bible college and to prepare myself through that college training for a lifetime of ministry, specifically as a church pastor. My religious beliefs are the only reason for me to seek a college degree.

Id.

Davey attended University High School in Spokane, Washington, and graduated in the top ten percent of his class. JA 41. His family's income, meanwhile, was below 135% of the median income level. *Id.* Davey therefore satisfied the academic and financial requirements of the Promise Scholarship, and he timely applied for that scholarship for use beginning with the 1999-2000 academic year. JA 8 (¶ 24), 27 (¶ 24); Pet. Br. at 9. The state, in letters of congratulations, subsequently notified Davey of his eligibility to receive the Promise Scholarship. JA 53-56.

Davey enrolled at Northwest College, a private, four-year college in Kirkland, Washington. JA 41. Northwest College is an eligible institution under the Promise Scholarship program. Pet. Br. at 9; JA 130; SER[2] 49 at 1, 3 (Decl. of Becki Collins with attached list of eligible institutions). Northwest is affiliated with the Assemblies of God. JA 42; ER 12, p. 13. "The mission of Northwest College is to provide, in a distinctly evangelical Christian environment, quality education to prepare students for service and leadership." ER 38, p. 47. Northwest College's concept of education is "distinctively Christian," *id.*; the faculty at Northwest does, however, "make it a point to express opposing points of view to deal with those questions that . . . others hold different views on." JA 107.

Davey chose to enroll at Northwest for four reasons: (1) it "offered a course of study that would allow me to fulfill my religious convictions regarding becoming a minister," JA 41;

[2]"SER" refers to the Supplemental Excerpts of Record in the Ninth Circuit.

(2) its cost was very reasonable, *id.*; (3) it was "relatively close to my hometown," JA 42; and, (4) its denominational affiliation (Assemblies of God) and tenets are "very similar" to Davey's (Foursquare Denomination), *id.* In particular, Davey noted, "one of things that attracted me to Northwest [was] the opportunity to study our world and our society from the viewpoint of a Biblical worldview." JA 43.

At Northwest College, students generally declare their intended majors upon enrollment. JA 152 (estimating only 15% enroll undeclared). Davey declared a double major in Pastoral Ministries and Business Management/Administration. JA 43. As Davey explained,

> I believed that this combination of courses would best prepare me for the complex management and spiritual tasks that comprise contemporary Christian ministry. Under this double major, I have studied or will study courses in a multitude of disciplines: humanities, science, mathematics, social science, business, finance, computer applications, religion, Biblical studies, and pastoral ministry.

JA 43.

c. The State's Disqualification of Davey

In October of 1999, Davey met with Northwest's financial aid officer, Lana Walter. JA 45. Ms. Walter informed Davey that, under state law and policy, "if he pursued a degree in theology" -- i.e., in Pastoral Ministries -- "the Scholarship would not be available to him." JA 77.

Davey was deeply dismayed:

> I felt that I was a second-class citizen in the eyes of the state. Somehow, apparently because my religious beliefs require me to pursue a degree in Pastoral Ministries and to eventually become a minister, my academic achievements were no longer worthy of official recognition, nor were my future

contributions to the state of Washington worthy of honor.

JA 46. Moreover, as Davey explained,

> [t]his unexpected, official demand to change my major or lose my funding confronted me with a serious dilemma: Should I change my religious beliefs that required me to study for the ministry? Worse, should I violate my religious belief regarding truthfulness by changing my course of study to a state-approved major, with the intent of switching back to the forbidden major once I had exhausted my Scholarship eligibility? Either way . . . I would have denied what I believed to be God's direction for my life, and would have had to violate my sincerely held religious beliefs.

Id. After "much pondering and prayer," *id.*, Davey "adhered to his decision to pursue his chosen career. As a result, no scholarship funds have been released to him." JA 77.

d. The Scope of the States' Disqualification of Theology Majors

The state's disqualification of theology majors may be encapsulated in the following summary, the details of which are set forth immediately below, *infra* pp. 7-11. Washington disqualifies from the Promise Scholarship those who *declare* a major in *theology* if that major is *taught from a religious viewpoint*. Those students who declare a major in theology taught from a *secular* perspective may keep their Promise Scholarships. Likewise, students who have *not declared* a major, or who have declared a major other than theology, may keep their Promise Scholarship while taking the *very same courseload* as a student who is disqualified for having declared a theology major. Furthermore, the state's disqualification applies even if the student declaring a theology major would use the scholarship funds exclusively for food, housing, transportation, or other "secular" expenses; students with

nontheology or undeclared majors, by contrast, may use Promise Scholarship funds even for the purchase of theology courses taught from a religious point of view.

Nothing in the appropriations legislation originally establishing the Promise Scholarship identified the pursuit of any particular major as a factor that would disqualify a student from receipt of the scholarship. JA 61 ("the Appropriations Bill creating this program is silent on this issue"); ER 38, pp. 51-52 (text of appropriations legislation). Indeed, the state has repeatedly touted the Promise Scholarship as broadly available to gifted but financially limited students. *E.g.*, JA 56 ("a quality education places *all of us* on a more level playing field") (emphasis added); ER 41, p. 52 (Governor's press release for event recognizing Promise Scholars) ("I believe that *every* student who shows promise should have the right to pursue the American Dream of a college education," Locke said. "'It's my dream that some day, *no* high-achieving student will be blocked from pursuing a higher education because of financial burdens") (emphasis added); *id.*, pp. 53-54, 56-59 (same).

However, a separate statute -- Wash. Rev. Code § 28B.10.814 -- expressly disallows all state aid "to any student who is pursuing a degree in theology." Pet. App. 92a. More recently, the statutory codification of the Promise Scholarship program adopted the same prohibition: "The scholarships may not be awarded to any student who is pursuing a degree in theology." Wash. Rev. Code § 28B.119.010(8) (Pet. App. 95a). The Promise Scholarship regulations likewise impose upon each student the qualification that, to be eligible to receive the scholarship, the student must "not [be] pursuing a degree in theology." WAC 250-80-020(12)(g) (JA 180).

The state requires participating institutions to certify that Promise Scholars are not "pursuing a degree in theology." JA 62; JA 60 (text of certification). The task of identifying what qualifies as "pursuing a degree in theology" is left to the

participating institutions. JA 126, 129-31, 137-39. Ultimate responsibility for determining whether a student is eligible to receive a Promise Scholarship, however, belongs to the Higher Education Coordinating Board (HECB) of the state. WAC 250-80-100(1)(b) (JA 186). (The HECB is in charge of administering the Promise Scholarship program. WAC 250-80-100(1) (JA 186).)

The statutory and administrative prohibition on "pursuing a degree in theology" does not bar *all* pursuit of a degree in religion or theology. Rather, a declared major in theology disqualifies a student from receipt of a Promise Scholarship *only* when the subject is taught from a perspective that is "devotional in nature or designed to induce religious faith," Pet. Br. at 6. Indeed, the state itself, through its own institutions of higher learning, teaches theology. *E.g.*, JA 66-74; ER 21, pp. 3-12 (course listings); ER 41, pp. 60-83 (selected syllabi). According to the state, a Promise Scholar may pursue a degree that entails the study[3] of "prayer, Messianism" (Relig. 210), "Quranic content" and "Muslim . . . religious thought" (Relig. 211), interpretation of the Old Testament (Relig. 405) and the New Testament (Relig. 220), "Buddhism as a religious way and as a way of thinking" (Relig. 354), "theological responses to the Holocaust" (Relig. 415), "Modern Christian Theology" (Relig. 428), "Christian Theology" (Relig. 528), "Islamic Theology" (Near East. 522), and the "Philosophy of Religion" -- including "the existence of God; the problem of evil; atheism; faith; religious experience and revelation; the attributes of God; miracles; immortality; and the relation between religion and morality" (Phil. 467) -- so long as the subject is taught from a "secular" point of view. Pet. Br. at 6. *See* JA 84 (professor describing religion courses at University of Washington) ("None

[3]The following courses are all listed in JA 67-72 except for the last three, which appear at ER 21, pp. 6 (Relig. 528), 9 (Near East. 522), 11 (Phil. 467).

of our courses are devotional in nature or designed to induce religious faith. The reality is quite the contrary . . ."): *id.* at 85 ("We have since taught about religions from a historical and strictly scholarly point of view").

That the religious *viewpoint* of the theology instruction is decisive is undisputed in this litigation. *See* Defts' Resp. Opposing Plaintiff's Motion for a Prelim. Injunc. at 14 n.5 (W.D. Wash. Mar. 6, 2000) (the statutory bar on pursuit of a theology degree in Wash. Rev. Code § 28B.10.814, "as guided by the extensive case law interpreting article 1 section 11 of the [Washington] constitution, shows that financial aid is unavailable to those pursuing religious instruction that is devotional in nature"); Defts' Mem. of Authorities in Support of Motion for Summary Judgment at 8 (W.D. Wash. July 24, 2000) ("Mr. Davey's courses are taught from the point of view that the Bible provides a 'blueprint' for how particular subjects should be understood by the students. (Davey Dep., p. 41:2-6 [JA 106]). This is precisely the type of indoctrination [sic] in specific beliefs of Christianity that is addressed by article I, section 11"); *id.* at 3 (no dispute that the ban on "pursuing a degree in theology" in § 28B.10.814 applies: "Northwest College educates students from a 'uniquely Christian point of view.' (Walter Dep., pp. 99:11-100:13 [JA 168-69] & Ex. 3 [ER 38, pp. 47-50: Northwest College Mission statement]). Mr. Davey's coursework toward his Pastoral Ministries major is taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible. (Davey Dep., p. 55:8-24 [JA 110]); Defendants/Appellees' Br. at 4 (9th Cir. Jan. 19, 2001) (same); Appellees' Pet. for Reh'g and Pet. for Reh'g En Banc at 5 (9th Cir. July 30, 2002) (same); Defendants/Appellees' Br. at 4 ("Theology courses at public institutions of higher education in Washington state, on the other hand, are taught from a strictly historical and scholarly point of view"); Pet. at 5 ("Northwest

. . . educates its students from a distinctly Christian point of view"); Pet. Br. at 10 ("The courses Davey would take in his Pastoral Studies major teach the Bible as truth, whereas a purely academic understanding would not necessarily subscribe to the Bible as ultimate truth").

Thus, Joshua Davey could use his Promise Scholarship to pursue a degree in theology at a public or private college, so long as that major was taught from any viewpoint other than a religious viewpoint. The state disqualified Davey from receipt of the Promise Scholarship solely because he announced his decision to pursue a theology degree taught from a *religious viewpoint*. Pet. App. 12a, 15a, 22a, 30a.

The ban on Promise Scholars pursuing a degree in theology is limited to *declared* theology majors. A student who simply declines to declare a major for the first two years of college is eligible to receive a Promise Scholarship. JA 161-62.[4] Likewise, a student who declares a major other than theology is eligible for the scholarship. JA 149, 156, 158.

As the state concedes, students with no declared major, or with a declared major other than theology, may receive a Promise Scholarship even if they take the very same courses as a declared theology major, including courses on theology that are taught from a religious viewpoint. Pet. at 17 ("Since Northwest is an eligible institution, Davey could attend Northwest -- using his scholarship -- and be exposed to that Christian point of view. The only thing he cannot do is use the scholarship to pursue a degree in theology"). In fact, Northwest College requires *all* students, regardless of major, to take

[4]The state relied upon this fact in its answer, objecting that the whole court case was Davey's fault because he could have simply declined to declare his major. JA 38 (¶ 7). (The state subsequently abandoned this legal argument. As noted above, the vast majority of students at Northwest declare their intended major upon enrollment. JA 152.)

religion courses. JA 151; ER 12, pp. 15-18, 20, 22-23.[5] These courses are taught from a Christian perspective, JA 168-69 -- indeed, they are designed to "cultivate a Christian worldview," ER 12, p. 16 -- but the state does not disqualify students attending Northwest from Promise Scholarships, so long as they do not declare a major in theology. JA 130 (Northwest is an eligible institution for Promise Scholars), 145 (fifteen Promise Scholars were attending Northwest in the 1999-2000 academic year).

The state's disqualification of theology majors from receiving Promise Scholarships is complete. That is, the restriction is not limited to *using* the scholarship funds for *religious* courses. As noted above, *non*theology majors are free to use their Promise Scholarships for any educational expense, including the tuition fees for theology courses. Declared theology majors, by contrast, may not even *receive* scholarship money, JA 61, 64, even if they would use the funds exclusively for food, housing, transportation, or tuition covering courses that fall outside the theology department. Moreover, if the student declares an eligible nontheology major -- as Davey did by declaring Business Management and Administration, JA 43 -- the addition of a theology major (as Davey did by declaring a double major) voids a student's eligibility to receive the scholarship, JA 155-56.

2. Course of Proceedings

Davey brought suit in federal district court seeking declaratory and injunctive relief, as well as damages, for the

[5]The four courses Northwest requires as part of its General College Requirements are "Exploring the Bible," "Principles of Spiritual Development," "Evangelism in the Christian Life," and "Christian Doctrine." ER 12, pp. 17, 18, 20, 22-23. Students face additional religious course requirements as part of their major. *E.g.*, ER 12, p. 19 (Biblical Studies Core for Psychology Major).

violation of his constitutional rights. JA 20-21. Davey alleged that the state's discriminatory disqualification of Davey from eligibility for receipt of the Promise Scholarship to which he was otherwise entitled, solely because he announced an intent to major in theology, was unconstitutional both facially (the categorical disqualification of theology majors) and as applied (to Davey). *Id.* Davey specifically alleged that the state's *de jure* discrimination against theology majors violated the Free Exercise (JA 11), Free Speech (JA 14), and Establishment (JA 13) Clauses of the First Amendment (as incorporated in the Fourteenth Amendment), and the Equal Protection Clause (JA 12) of the Fourteenth Amendment.[6]

The district court granted summary judgment for the state defendants, Pet. App. 51a; JA 170, and Davey appealed. Pending the ultimate outcome of the litigation, the state placed $1,542.00 -- the amount of the Promise Scholarship award which Davey would have received for his second year of study, JA 95 -- in a private escrow account. JA 175-77.[7]

The U.S. Court of Appeals for the Ninth Circuit reversed by a 2-1 vote. Pet. App. 1a.

The Ninth Circuit majority noted that the disqualification of

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[6]Davey also alleged violations of the Washington State Constitution. JA 17-20. Those claims are not before this Court.

[7]The state correctly notes that the state initially offered simply to "set aside . . . in its operating budget" the amount in question. Pet. Br. at 15. The ultimate agreement, however, instead required the state's purchase of a certificate of deposit, and provided a contractual agreement regarding the disposition of that CD. *See* JA 176-77. Under that agreement, the CD will be released to the party that ultimately prevails in this litigation. *Id.*

Importantly, the district court relied upon the set-aside of these funds in denying Davey's request for an injunction pending appeal. JA 173-74 (set-aside "virtually obviates the risk of irreparable harm" and thus "court accepts HECB's offer to set aside $1,542 during the pendency of Davey's appeal, which shall be paid to Davey upon court order in the event that he prevails on appeal").

theology majors "lacks neutrality on its face." *Id.* at 8a.

> The Promise Scholarship program is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit; otherwise the Scholarship is available to all secondary school graduates who have high enough grades, low enough income, and attend an accredited college in the state. And the policy as applied excludes only those students who declare a major in theology that is taught from a religious perspective.

Id. at 14a-15a. The court distinguished cases involving neutral programs that only incidentally affect religion as "different from being directly disabled from participating in a government program on the basis of religion," *id.* at 23a. "As this classification facially discriminates on the basis of religion," the court ruled, "it must survive strict scrutiny." *Id.* at 8a.

> This is not a case where a person claims that denial of a financial benefit which is not available to others deprives him of his free exercise rights. Davey was denied a Promise Scholarship to which he was otherwise entitled solely because he personally chose to pursue a religious major. For this reason we must strictly scrutinize the restriction. *See McDaniel* [*v. Paty*], 435 U.S. [618,] 628 [(1978)]; [*Church of the*] *Lukumi* [*Babalu Aye v. City of Hialeah*], 508 U.S. [520,] 546 [(1993)].

Id. at 24a-25a.

Applying strict scrutiny, the court found no compelling interest that could justify the state's express discrimination against religion. The Ninth Circuit concluded that, as in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution." Pet. App. 27a. Moreover, the court found especially unpersuasive

any asserted concern about state funding of religion.

> The Promise Scholarship is a secular program that rewards superior achievement by high school students who meet objective criteria. It is awarded to students; no state money goes directly to any sectarian school. Scholarship funds would not even go indirectly to sectarian schools or for non-secular study unless an individual recipient were to make the personal choice to major in a subject taught from a religious perspective, and then only to the extent that the proceeds are used for tuition and are somehow allocable to the religious major. *See Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (emphasizing importance of neutrality and individual choice in upholding voucher program). The proceeds (approximately $1,500 in Davey's [second] year) may be used for any education-related expense, including food and housing; application to religious instruction is remote at best. HECB does not argue otherwise. In these circumstances it is difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his Scholarship.

Pet. App. 29a-30a. Hence, the court ruled, the discriminatory state restriction on theology majors failed strict scrutiny and unconstitutionally violated Davey's Free Exercise rights. *Id.* at 30a-31a. The court below therefore did not need to reach Davey's other federal constitutional claims, *id.* at 31a, namely under the Free Speech, Establishment, and Equal Protection Clauses, *id.* at 7a.

Judge McKeown dissented. *Id.* at 31a.

The Ninth Circuit denied rehearing, Pet. App. 86a. This Court granted certiorari. *Locke v. Davey*, 123 S. Ct. 2075 (2003).

SUMMARY OF ARGUMENT

The state's express, discriminatory disqualification of otherwise eligible scholarship recipients, solely because they declare a major in theology taught from a religious point of view, violates the Free Exercise Clause of the First Amendment. *Infra* § I. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978). The state's discrimination against religious viewpoints is explicit and undisputed; hence, strict scrutiny applies. That Davey adhered to his religiously chosen course of study, despite the state's forfeiture of more than $2,500 in scholarship funds to which Davey was otherwise entitled, does not exonerate the state. State interference with the free exercise of religion need not *successfully* thwart private religious choices in order to be unconstitutional. The state proposes that Davey could have simultaneously attended two colleges, each part-time, and received the Promise Scholarship at one college while pursuing a theology degree at the other. But even assuming such an awkward and cumbersome option were available, the fact of discrimination remains: the state forces *only* theology majors to undertake such convoluted measures.

Applying strict scrutiny, the challenged restriction fails both for want of a compelling interest and for lack of narrow tailoring. The state's interest in enforcing what it claims are more strictly separationist requirements in its state constitution cannot trump federal constitutional rights. Moreover, the connection between the disqualification of declared theology majors and the state's proffered concern over official support for religious instruction is so attenuated and riddled with inconsistencies as to refute any claim of narrow tailoring.

The state's express discrimination against those who declare a major in theology only when taught from a religious viewpoint also runs afoul of the Free Speech Clause. *Infra* § II. *See*

Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819 (1995). Discrimination against the religious viewpoint of private speakers is unconstitutional regardless of how one characterizes the forum at issue. Here, the state does not even invoke a countervailing Establishment Clause claim, as in *Rosenberger*. Because the choice of a college major and the viewpoint of the instruction provided at private institutions represent genuinely private expression, neither the cases involving *government speech*, nor the cases involving *government instruction*, can exonerate the state's discrimination against religious viewpoints in the present case.

The state's plea that it is simply declining to fund the exercise of a right is unavailing. *Infra* § III(A). Here the state *does* fund the pursuit of education at private institutions, including the pursuit of a major in the *subject* of religion. The constitutional defect arises from the state's imposition of an invidious *viewpoint*-based disqualifier upon otherwise eligible private educational pursuits. The state's invocation of the doctrine of unconstitutional conditions, meanwhile, leads to the same conclusion. *Infra* § III(B). Here, the state penalizes the exercise of personal religious choices with the forfeiture of over $2,500 worth of state scholarship funds to which the recipient would otherwise be entitled.

Because the state's anti-religious discrimination embodies hostility, not neutrality, toward religion, and because a disqualification tied to private *religious* choices yields impermissible state entanglement with religion, the challenged restriction also violates the Establishment Clause of the First Amendment. *Infra* § IV.

Finally, the state's express, intentional discrimination against those persons who choose to pursue a theology degree taught from a religious perspective fails both strict scrutiny and rational basis review under the Equal Protection Clause of the Fourteenth Amendment. *Infra* § V.

This Court should affirm the judgment of the Ninth Circuit holding the state's express, anti-religious discrimination in this case to be unconstitutional.

ARGUMENT

The essential question is whether the state, having chosen to issue Promise Scholarships to economically needy, academically talented students attending accredited colleges, Pet. App. 8a-9a, can strip a scholarship from an otherwise eligible recipient, *id.* at 9a-10a, just because he announces his intention to "pursu[e] a degree in theology taught from a religious perspective," *id.* at 30a. This anti-religious, viewpoint-based discrimination clearly offends the First and Fourteenth Amendments to the U.S. Constitution.

Petitioners have conceded that respondent Davey faces discrimination targeting a religious viewpoint. *Supra* pp. 8-10. The very premise of the state's exclusion of Davey from the Promise Scholarship program is that "Davey's coursework towards his Pastoral Ministries major was taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible." Appellees' Pet. for Reh'g and Pet. for Reh'g En Banc at 5 (9th Cir. July 30, 2002) (No. 00-35962). *Accord* Defendants/Appellees' Br. at 4, *Davey v. Locke*, No. 00-35962 (9th Cir. filed Jan. 18, 2001) (same); Pet. App. 9a-10a; *id.* at 12a ("state policy excludes only those [scholarship] recipients who pursue the study of theology from a religious perspective"); *id.* at 15a, 22a, 30a. This concession alone suffices to doom the restriction as offensive to Davey's constitutionally protected rights to free speech, free exercise of religion, equal protection, and freedom from religious establishments.

Notably, the State does *not* defend its anti-religious discrimination by invoking the federal Establishment Clause. Such a defense would in any event be meritless. *Witters v.*

Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (*Witters II*).

The Ninth Circuit held the state's express, anti-religious discrimination to be unconstitutional. This Court should affirm that judgment.

I. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THEOLOGY MAJORS VIOLATES THE FREE EXERCISE CLAUSE.

The state concedes that there is "no question that [respondent Joshua] Davey has a constitutional right to practice his religion, including pursuing a degree in theology." Pet. Br. at 23. *See also id.* at 24 (same); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("the 'exercise of religion' often involves . . . the performance of . . . acts"). The undisputed record likewise demonstrates that Davey's decision to attend Northwest College, and to double-major in Pastoral Ministries and Business Management/Administration, reflected deeply religious personal choices and represented Davey's effort to live out his religious beliefs. JA 40 (¶ 4), 41-42 (¶ 9), 43 (¶¶ 14-15), 46 (¶¶ 26-28), 101, 103, 114. *See also supra* pp. 3-5.

By expressly singling out for special disabilities only those students, like Joshua Davey, who are pursuing theology degrees taught from a religious viewpoint, the state has committed a textbook violation of the Free Exercise Clause of the First Amendment.

A. Washington Has Created a Religious Gerrymander.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). Government

may not "impose special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877. *Accord McDaniel v. Paty*, 435 U.S. 618 (1978). Thus, "the minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533.

1. The religious discrimination is explicit.

In the present case, Washington has doubly offended this basic requirement of the Free Exercise Clause. First, the statute and regulations at issue expressly target, for special disabilities, the pursuit of a religious major. Pet. App. 92a (Wash. Rev. Code § 28B.10.814) (disqualifying "any student who is pursuing a degree in theology"); JA 180 (WAC 250-80-020(12)(g)) (disqualifying students "pursuing a degree in theology"). No student pursuing "a degree in theology" may receive a Promise Scholarship (or any other state student financial aid, Pet. App. 92a). Second, compounding this express discrimination, Washington applies its restriction only to the pursuit of a theology major *taught from a religious perspective*. *Supra* pp. 8-10. This is *par excellence* a "religious gerrymander," *Lukumi*, 508 U.S. at 535. The state's reliance upon the constitutional rules governing "neutral and uniform" laws that only "indirectly and incidentally" burden religious choices, Pet. Br. at 34; *see generally id.* at 33-36, are thus wholly inapposite.

The present case represents that "extreme" situation "in which a State directly targets a religious practice," *Smith*, 494 U.S. at 894 (O'Connor, J. concurring in judgment). *See Lukumi*, 508 U.S. at 577-78, 580 (Blackmun, J., joined by O'Connor, J., concurring in judgment) (on "those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case," the "case is an easy one to decide"). Washington "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity," *McDaniel*, 435 U.S.

at 632 (Brennan, J., concurring) -- i.e., Washington specially disqualifies otherwise eligible students from state financial aid when those students, in Davey's words, "take their faith so seriously that they want to serve their fellow believers and their society through their faith . . . including their choice of college and career," JA 46.

2. The state's profession of an innocent motive is irrelevant.

The state argues that it harbors no malice toward religion, and that the restrictions at issue were enacted for good motives. *E.g.*, Pet. Br. at 21. "But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). The discriminatory restriction on clergy at issue in *McDaniel* purported to be admiring and solicitous of the religious duties of ministers, 435 U.S. at 621 n.1 (preamble to state constitutional restriction: "Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions"); nevertheless, this Court unanimously held the restriction unconstitutional. *See also Lukumi*, 508 U.S. at 559 (Scalia, J., concurring) ("Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens").[8]

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[8]This discrimination is even more evident in light of the invidious anti-Catholic bigotry of the Blaine Amendments, *see* Opp. at 16, a bigotry recognized in opinions joined by a majority of the members of this Court. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., joined by Stevens and Souter, JJ.). *Cf.* Brief of American Jewish Congress et al. at 26-30 (conceding taint of "raw anti-Catholicism" (at 26) but arguing that (continued...)

3. Davey's ability to overcome or circumvent the discrimination is irrelevant.

The state observes that denial of scholarship funds "did not prevent Davey from pursuing his Pastoral Studies major at Northwest." Pet. Br. at 12. *See also id.* at 24. This is true but entirely irrelevant. There is simply no precedent -- and the state cites none -- for the remarkable proposition that a restraint on free exercise must be successful in order to be unconstitutional. Throughout history, many courageous men and women have resisted threats and inducements from the state and instead adhered to the course their faith commanded. That these often heroic witnesses chose adherence to their faith despite pressure from the state does not imply that the government was not impairing their religious free exercise. And while the state in this case did not threaten Davey with torture or death, *cf.*, *e.g.*, 2 Maccabees 6:18-31, 7:1-42. it did require his forfeiture of a total of $2,667.00 in state aid ($1,125 for the first year, JA 55, and $1,542 for the second year, JA 95) as the price of adherence to his religious convictions. No rule of constitutional law creates an exemption for invidious state discrimination against religion when it is "unsuccessful" or "not extremely burdensome." Davey faced "an attempted coercion" to act contrary to his beliefs. JA 121. He "was given a choice to either fully exercise my faith or receive a government benefit for which I qualified," JA 47. The state's coercion need not prevail over individual

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[8](...continued)
fear of Catholicism was a "legitimate" (at 27) response to "infamous" (at 28) Catholic teachings). *See also* Brief of Historians and Law Scholars at 18 ("it is indisputable that anti-Catholic animus motivated many supporters of the [Blaine] amendment and colored the debates surrounding its near enactment"); *id.* at 2, 14, 17, 23, 25 (conceding anti-Catholic taint).

conscience to be unconstitutional.[9]

The state nevertheless repeatedly insists that it "does not burden" Davey's free exercise. *E.g.*, Pet. Br. at 38. But the forfeiture of $2,667 in response to the making of a private religious choice is unquestionably a burden on religion. Moreover, where the state treats religion in an expressly discriminatory and unfavorable manner, as here, that is in itself a burden on religion. *McDaniel*, 435 U.S. at 635 n.8 (Brennan, J., concurring) ("establishing a religious classification as a basis for qualification" is "void without more"). Invidious discrimination is no less unconstitutional when applied to small matters (like segregated water fountains).

The state suggests that Davey might have split his college education between two institutions, used the Promise Scholarship at Northwest for a business degree, and gone elsewhere for his theology studies. Pet. Br. at 12, 20, 24-25, 38-39. But Davey's choice to attend Northwest, like his choice of a major, reflected the pursuit of his personal religious faith. JA 41-42. *See supra* pp. 4-5. Telling Davey to go to some other school for some or all of his college education is just another way of discriminating against an otherwise eligible student

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[9]The ACLU would confine Free Exercise safeguards to protection against criminal penalties and legal disabilities. Brief of American Civil Liberties Union et al. at 21-22. Of course, here Davey *does* face a legal disability, as his choice of a theology major barred him from receipt of a state scholarship to which he was otherwise entitled. But in any event, the ACLU's parsimonious view of the scope of Free Exercise rights is flat wrong. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *Accord Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). For example, nothing in *Lukumi* suggests that if the city, instead of adopting a criminal prohibition, had merely imposed an excise tax, or a forfeiture of some financial benefit, for engaging in religious animal sacrifice, the result would have been any different. It was not the *severity* of the restriction, but its *discriminatory reach*, that rendered it unconstitutional. *Lukumi*, 508 U.S. at 524.

attending an otherwise eligible institution. *Cf. Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982) ("Without question," school's discriminatory policy "worked to [the student's] disadvantage," even though he "could have attended classes and received credits" in similar program at some other school); *Schneider v. State*, 308 U.S. 147, 163 (1930) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). The state's protestations cannot negate the undisputed fact that, unlike all other Promise Scholars, Davey (or any other would-be theology major) was not allowed to pursue the degree of his choice while attending the college of his choice.

Notably, this argument about "college-splitting," albeit meritless, is absolutely essential to the state's position. The state concedes that "Davey has a right to practice his religion -- including pursuing a degree in theology," Pet. Br. at 24, and that "the government may not condition the receipt of a benefit on the relinquishment of a constitutional right," *id.* at 30. Thus, the state has conceded that the challenged restrictions are unconstitutional if they condition receipt of the Promise Scholarship upon the surrendering of the right to pursue a degree in theology -- which of course is precisely what the restrictions do. The state's only recourse is to deny that the restrictions *in fact* require a scholarship recipient to forego pursuit of a theology major, because, in theory, the option of attending two different colleges at once might enable a student to evade the restriction. But as pointed out above, only *theology* majors face this awkward and burdensome rigamarole. Moreover, the option of college-splitting ignores the fact that Davey chose an *institution* -- Northwest College -- not just a *degree*. *See* JA 41-42. The state offers no explanation why different rules should govern the permissibility of the state's discriminatorily interfering with the religiously motivated choice of a *major*

(which the state apparently concedes is unconstitutional), and state's discriminatorily interfering with the religiously motivated choice of a *college*.

B. Washington's Anti-religious Discrimination Fails Strict Scrutiny.

When "religious practice is being singled out for discriminatory treatment," *Lukumi*, 508 U.S. at 538, the challenged government restriction "must undergo the most rigorous of scrutiny," *id.* at 546. *See also id.* at 531. *Accord Smith*, 494 U.S. at 886 n.3 ("we strictly scrutinize governmental classifications based on religion").[10]

This Court has noted the demanding nature of strict scrutiny in this context. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. It may well be that "[w]hen a law discriminates against religion as such, as . . . in this case, it automatically will fail strict scrutiny," *id.* at 579 (Blackmun, J., joined by O'Connor, J., concurring in judgment), "because a law that targets religious practice for disfavored treatment both burdens the free exercise

[10]Various amici supporting the state seek to evade strict scrutiny by invoking the notion of "play in the joints" between the Free Exercise and Establishment Clauses. *E.g.*, Brief of American Jewish Congress et al. (AJC) at 1-2. But the "play in the joints" concept reflects this Court's concern that an overly rigid reading of the Establishment Clause could impair "the transcendent value of free religious exercise in our constitutional scheme," *Norwood v. Harrison*, 413 U.S. at 469. To turn that concept into a license for the state to engage in express, anti-religious discrimination would be entirely to pervert that concept. Interestingly, the AJC brief appears to agree that, at least as applied to Joshua Davey, the challenged restriction is unconstitutional because "Davey was penalized for having an additional religious major, even though his secular major [business] alone would have sustained his eligibility for a grant." AJC Br. at 12 n.8.

of religion and, by definition, is not precisely tailored to a compelling government interest," *id.* *See also id.* at 563 (Souter, J., concurring) (embracing the "noncontroversial principle" that "formal neutrality" is a "necessary condition[] for free-exercise constitutionality").

Here, even if Washington's express anti-religious discrimination is not *ipso facto* unconstitutional, *see id.* at 579 (Blackmun, J., joined by O'Connor, J.) (law that is not neutral and "targets religion" for burdens "ipso facto, fails strict scrutiny"), the discrimination at issue plainly fails both requirements of strict scrutiny: no compelling interest justifies the restriction, and the restriction is not narrowly tailored to the state's asserted interests.

1. No compelling state interest justifies the state's anti-religious discrimination.

There is, of course, no legitimate state interest in discouraging or penalizing the study of religion, including study from a religious perspective. (Deterrence of the pursuit of theology degrees is the principal consequence of the restriction challenged here. JA 161-62.) The state understandably does not proffer any such interest. Instead, the state asserts an interest in "avoiding government funding of religious instruction," Pet. Br. at 21.[11] Whether this purposed state interest be understood as an effort to comply with the state constitution, *id.* at 31, or as an effort to protect objecting taxpayers, *id.* at 35, this interest cannot be

[11]The purpose of the Promise Scholarship program is "to help low and middle income students reap the economic benefits of a college education," Pet. Br. at 47. This purpose is religion-neutral and wholly compatible with grants to *all* students, regardless of majors. Pet. App. 21a-22a. The state does not claim that the purpose of the scholarship program itself somehow requires, or is in any way furthered by, the discriminatory disqualification of theology majors. To the contrary, such discrimination directly undercuts the program's goal of making a quality education available to "all of us," JA 56.

characterized, in the present context, as "compelling."

a. Compliance with state constitution

The state cannot legitimately claim a compelling interest, in the present context, in following the Washington state constitutional provisions separating church and state.

First of all, those state constitutional provisions may not even *require* the express anti-religious discrimination contained in the statutes and regulations at issue here. While in 1989 the state supreme court sustained such a view, *see Witters v. State Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (*Witters III*), *cert. denied*, 493 U.S. 850 (1989), there is every reason to believe that the state supreme court would no longer consider *Witters III* to reflect a correct interpretation of the Washington Constitution. *See* Opp. at 3-6.[12]

Moreover, even if *Witters* remains valid as a matter of *state* constitutional law, it remains the case that as a matter of *federal* constitutional supremacy, U.S. Const. art. VI, cl. 2, no state constitutional provisions may be used to trump federal constitutional rights: "the state interest asserted here -- in achieving greater separation of church and State that is already ensured under the Establishment Clause of the Federal Constitution -- is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). *Accord PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (acknowledging state's

[12]Of course, regardless of whether the state *constitution* requires such discrimination, the pertinent state *statutes* and *regulations* do. *See* Wash. Rev. Code §§ 28B.10.814 (Pet. App. 92a), 28B.119.010(8) (Pet. App. 95a); WAC 250-80-020(12)(g) (JA 180). Hence, contrary to the suggestion of one amicus, there would be no point to certifying to the Washington Supreme Court "the question whether the challenged regulation is still required to comply with the Washington constitution," AJC Br. at 12 n.8, so long as the challenged statutes and regulations provide an independent source for the disqualification of theology majors.

"sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," but noting that any restrictions imposed pursuant thereto must not "contravene any other federal constitutional provision"). Thus, as in *Widmar*, "[i]n this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling'" to justify discrimination against private religious choices. 454 U.S. at 276. As one of the state's amici concedes, "[t]he Free Exercise (and Equal Protection) Clauses do not become nullities because a state ensconces a restriction on its relations with religion in its constitution." AJC Br. at 15.

This is the only sensible rule. Federal constitutional rights do not expand or contract from state to state in response to state constitutional enactments on the matter. Were the contrary true, states could blunt the reach of federal constitutional rights by incorporating countervailing provisions into their state constitutions.[13] The U.S. Constitution would not set a national standard for federal rights, but instead would merely create a "default rule" that would prevail in the absence of contrary state constitutional provisions. The U.S. Constitution, however, is the "supreme law of the land . . . any thing in the *Constitution* or laws *of any state* to the contrary notwithstanding." U.S. Const., art. VI, cl. 2 (emphasis added).

b. Protection of taxpayer conscience

Nor can Washington assert a compelling state interest in protecting taxpayer conscience, i.e., preventing the use of tax money to support the study of religious views with which some

[13]For example, a state might adopt a provision guaranteeing "full civil remedies" for "all persons" against "outrageous defamatory communications," and then invoke that provision as a justification for not following the First Amendment holding in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

taxpayers may disagree.

At the outset, there is a great irony to the state's argument. This Court has held that *viewpoint neutrality* toward private speech provides the necessary protection of the conscience rights of those who object to funding certain activities. *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000). Yet here, Washington asserts the exact opposite: that the state must be *viewpoint-discriminatory* toward private religious speech to protect the conscience of its citizens. This contention is facially implausible.

In any event, Washington has shown, by its own actions, that it does not take this asserted interest seriously. Washington permits Promise Scholars to use scholarship funds to study theology, taught from a religious perspective, to their hearts' content -- so long as they either do not declare a major in their first two years or declare a major other than theology. *Supra* pp. 10-11. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks, editing marks, and citations omitted). Moreover, Washington demonstrates no solicitude for those taxpayers who may object to the way religion or ultimate truth is addressed in coursework taught from nonreligious viewpoints. *See* JA 67-74. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546-47.

Importantly, the Promise Scholarship funds students, not schools. Washington concedes that it "has no interest in preventing Davey from using his *own* funds to obtain a theology degree." Pet. Br. at 25 (emphasis added). But once the Promise

Scholarship funds are disbursed to a student, they *are* that student's own funds. *See* JA 7 (¶ 22), 27 (¶ 22), 184 (WAC 250-80-060(4)), 186 (WAC 250-80-100) (no provision for supervision of student's expenditures). Any connection between a tax dollar and a religious course is solely the result of the intervening, "genuinely independent and private" choice of the scholarship winner, and not the direction of the state. *Witters*, 474 U.S. at 487. The nexus between Promise Scholarships and religious study is thus comparable to -- and as attenuated as -- the nexus between a government employee's salary and that employee's donations to a church or synagogue. *Id.* at 486-87. There is thus no "official advancement of religion," Pet. Br. at 40, contrary to the state's contention. "[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488. Such "attenuated" links between tax dollars and religious courses, *id.*, wholly dependent on contingent, intervening private choices, are not the stuff of compelling interests in protecting taxpayer consciences.[14]

Lacking any compelling interest to support it, the state's *de*

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[14]The state also raises an interest in avoiding "the establishment of an official religion," Pet. Br. at 35, but offers no explanation of how a neutral program of student financial aid could possibly jeopardize that interest. In addition, the state claims an interest in avoiding "the entanglement that accompanies the flow of public funds." *Id.* But the imposition of a religion-based category of exclusion "would risk greater entanglement," *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981), while a nondiscriminatory policy "would in fact *avoid* entanglement with religion," *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality) (emphasis in original), by removing religion as a factor in the state's administrative calculus. (The state tries to dodge this concern by delegating the definition and identification of "theology" to the private colleges, Pet. Br. at 8. While the state is to be commended for leaving religious decisions to private religious entities, the state has nevertheless created the problem by imposing a religious criterion of exclusion in the first place. *See also infra* note 22.)

jure anti-religious discrimination fails strict scrutiny.[15]

2. The anti-religious discrimination is not narrowly tailored to the asserted state interests.

The state's anti-religious restriction fails strict scrutiny for a second, independent reason, as well: the absence of narrow tailoring. *Lukumi*, 508 U.S. at 546 ("The absence of a narrow tailoring suffices to establish the invalidity of the [law]").

If the state interest is considered the avoidance of tax-supported education for those students pursuing religious vocations,[16] the obvious response is that the state has not prohibited any such thing. Prospective (or current) clergy *can* use Promise Scholarships to study, so long as they do not declare a major in theology taught from a religious perspective. A prospective priest, minister, or rabbi could use a Promise Scholarship to pursue a degree in Aramaic, Greek, or Hebrew, psychology or philosophy, history, counseling, ethics, business

[15]The ACLU postulates that the state has an interest in equalizing the *impact* of its programs on various religious denominations. ACLU Br. at 19-20. Thus, any program that might be of greater use to some, but not all, religious groups, according to the ACLU, presents an occasion for the state to disqualify *all* religious users to prevent *some* denominations from obtaining a relative advantage. *Id.* The state does not assert any such interest in leveling the religious marketplace. Nor is it the proper business of the state to impose handicaps on religious choices, as if trying to even out a bowling tournament or a horse race. For the state even to undertake efforts to balance out religions would raise serious entanglement concerns. The fact is that access to any particular government facility (e.g., parks, school buildings, municipal theaters) or program (e.g., scholarships, provision of aid to the poor) will be more realistic or appealing for adherents of some religions than to adherents of others. But that fact is a reflection of religious diversity, not a failure of government to neutralize religious variety.

[16]Such an asserted interest is itself constitutionally offensive as a status-based disability for clergy. *McDaniel v. Paty*, 435 U.S. 618 (1978).

administration, or any other "nontheology" major, at any accredited institution in Washington. That same future member of the clergy could take courses, including theology itself, steeped in a religious perspective, using a Promise Scholarship, so long as that person was not a declared theology major. And that same person could even major in theology, so long as it was not taught from the taboo religious perspective. Thus, the current restriction is very poorly linked to any objection to funding the training of clergy. On the other hand, Promise Scholars who are confirmed atheists, or who are solidly committed to a career in law, medicine, or some other employment aside from religious ministry, are nevertheless barred by Washington's restriction from majoring in theology if it happens to be taught from a religious viewpoint.

Washington may respond that its restriction is not tailored to the *student's* ministry plans, but rather to the use of state funds to obtain the religious message of the *teaching* itself. Pet. Br. at 43 ("religious instruction that inculcates religious belief (or disbelief)"). Leaving aside for a moment the obvious free speech flaws of this approach, *see infra* § II, such a response still fails to demonstrate narrow tailoring. As noted above, Promise Scholars can use state funds to study theology *taught from a religious perspective* so long as they have not declared a major in theology (which they need not do during the full two-year period the scholarship covers, JA 128).

If the state were genuinely concerned with the use of tax funds to purchase religious instruction, it would (insofar as it could) directly forbid the *use* of scholarship funds *for such courses*. "[A]ssistance properly confined to the secular functions of secular schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." *Norwood v. Harrison*, 413 U.S. 455, 468 (1973). Instead, Washington *allows* nontheology majors to use scholarship funds to purchase

religious instruction, but *disallows* declared theology majors the use of scholarship funds even for food or rent or for secular courses like chemistry or physical education.[17] The state's eligibility restriction disqualifies a declared theology major from receiving the scholarship even if that student uses only personal funds to pay for the theology courses. As noted, Washington concedes that it "has no interest in preventing Davey from using his own funds to obtain a theology degree." Pet. Br. at 25. Yet even if he does so, the state penalizes him for declaring his intent to major in theology. Such simultaneous overbreadth and underinclusiveness refutes any claim of narrow tailoring. *Lukumi*, 508 U.S. at 546.

Finally, it must be emphasized that the state constitutional prohibition on the appropriation or application of public money "to any religious worship, exercise or instruction," Wash. Const. art. I, § 11 (Pet. App. 88a), *does not require the adoption of religion-discriminatory programs*. For example, Washington could confine the Promise Scholar program to its own state schools. Such a restriction would not entail any unconstitutional religious classifications, but would instead distinguish between public and private institutions. And, of course, Washington is not required to have the Promise Scholarship program in its current form at all; the legislature is free to restructure the program to achieve its legitimate goals by means compatible with both state and federal constitutional requirements. *See Wheeler v. Barrera*, 417 U.S. 402, 419-20 (1974) ("The choice of programs is left to the State . . . . If one form of services . . . is rendered unavailable because of state constitutional proscriptions, the solution is to employ an acceptable alternative form," and thus, "illegality under state law" would "not provide a defense" to federal noncompliance). The state should not be

[17]Northwest students, regardless of major, are required to take courses in math, lab science, English, art, music, history, and social science. *See* ER 12, p. 17 (General College Requirements).

entitled to claim a privilege to discriminate invidiously because its own administrative policy choices force it into an alleged constitutional conundrum. There is certainly no rule that says that when a state is caught between violating someone's federal constitutional rights and supposedly violating a state constitutional rule, that choosing the former is a permissible option.

In sum, the challenged restriction fails strict scrutiny.

II. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THOSE WHO DECLARE MAJORS IN THEOLOGY TAUGHT FROM A RELIGIOUS VIEWPOINT VIOLATES THE FREE SPEECH CLAUSE.

The state's anti-religious discrimination here, which penalizes both the declaration of a theology major and the religious viewpoint from which that major is taught, violates the federal constitutional right to free speech. Religion is admittedly an acceptable subject of study for Promise Scholars, including as their announced major. *See* Pet. Br. at 5 ("the Washington constitution . . . does not prohibit the secular study of the topic of religion"), 6 ("[t]his same constitutional line governs this scholarship aid" and "to this end" the disqualification of those pursuing a degree in theology was adopted). The state takes issue only with the *religious viewpoint* of such study, *supra* pp. 8-10.

A. The First Amendment Protects Religious Speech, Including Instruction, Against Viewpoint Discrimination.

Religious instruction is constitutionally protected. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment") (and cases cited). *See also Pierce v.*

Society of Sisters, 268 U.S. 510 (1925). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 514 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, *we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.*

Id. (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination against religious speech, including worship and instruction. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. *Good News Club v. Milford Central School*, 533 U.S. 98, 107-12 (2001); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint").

Viewpoint-based discrimination -- an even more egregious form of censorship than merely content-based discrimination, *Rosenberger*, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. *See Lamb's Chapel*, 508 U.S. at 390-92; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, it is unnecessary to decide whether a forum is "public" or "nonpublic" -- in either case, such censorship is unconstitutional. *Lamb's Chapel*, 508 U.S. at 391-92. *Accord* Brief of Vermont

et al. at 19 n.6 (conceding that if forum analysis applies, the restriction must be viewpoint-neutral to be constitutional).

B. Rosenberger Controls this Case.

In *Rosenberger*, this Court held that when government makes funding broadly available for private, education-related uses, including private speech activities, that funding creates a forum for speech. 515 U.S. at 830. In such a forum, discrimination on the basis of the religious viewpoint of the speaker is unconstitutional. That the forum is more "metaphysical" than "spatial" is immaterial. *Id.*

Contrary to the state, Pet. Br. at 22, 45, *Rosenberger* cannot be distinguished from the present case on the premise that the program in *Rosenberger* was primarily designed to promote private speech. The purpose of the fund at issue in *Rosenberger* was not merely or even principally to promote private expression, but rather "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" 515 U.S. at 824. Moreover, student groups engaged in news, entertainment, and communication were distinctly a minority -- 15 out of 118 -- of the groups receiving funding. *Id.* at 825. In the present case, as in *Rosenberger*, the state dispenses funds for the pursuit of private educational activities, including but not limited to speech, but imposes a viewpoint-based restriction on the program. *Rosenberger* is thus indistinguishable.[18]

The present case, of course, is even easier than *Rosenberger*. In *Rosenberger*, this Court divided sharply over the merits of the

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[18]Nor can *Rosenberger* be distinguished, as the state suggests, Pet. Br. at 47-48, by pitting *Rosenberger* against *Mitchell v. Helms*, 530 U.S. 793 (2000). The present program of grants to individual students, who then apply the funds to their own privately chosen educational course, is clearly analogous to *Rosenberger* and unlike the direct assistance to religious schools at issue in *Mitchell*.

government's asserted Establishment Clause justification for its viewpoint discrimination. Here, however, there is no Establishment Clause claim on the other side of the ledger. The state has never even made such a claim, and in any event, this Court's unanimous holding in *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), would render any such claim meritless. Hence, the case at bar presents the much simpler question whether, in the absence of any countervailing Establishment Clause claim, express discrimination against private speech from a religious viewpoint violates the federal constitutional right to free speech. The answer, plainly, is "yes."

Notably, the restriction challenged here presents a double burden on speech from a religious viewpoint. First, the restriction disqualifies otherwise eligible scholarship recipients when they pursue a major in theology *taught from a religious perspective*. Instruction is speech, of course, and making instruction a disqualifying factor, for those who would receive that speech,[19] *because of the religious viewpoint* of that instruction, imposes a penalty precisely on the viewpoint of the speech. In this respect, the present case is identical to *Lamb's Chapel* and *Good News*, both of which involved targeted governmental discrimination against private instruction from a religious perspective. Second, the state only imposes the restriction at issue here in response to a communication: the declaration of a major. So long as a Promise Scholar keeps mum about his intended major (or even temporarily declares a major other than theology), there is no disqualification. But should a student formally utter an intent to major in theology, that student is instantly disqualified from receipt of the Promise Scholarship. Plainly, the state is imposing a burden -- an invidiously discriminatory burden, no less -- upon speech itself. This is

[19]The First Amendment protects not just the right to speak but also the right to receive that speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

patent state discrimination against private speech from a religious point of view, and it is unconstitutional under the Free Speech Clause.[20]

C. The Rules for Government Speech Do Not Shelter Washington's Discrimination Against Private Speech.

The state claims that there is a "neutral distinction between secular and religious instruction," Pet. Br. at 21. *See also id.* at 36, 39-44. This claim overlooks the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (emphasis in original). There is a world of constitutional difference between a state eschewing any position pro or con on religious issues when the state is itself doing the teaching, on the one hand, *e.g.*, JA 84-85, and a state discriminating in its treatment of private speakers teaching from a religious perspective, *e.g.*, *Lamb's Chapel*; *Good News*; *Rosenberger*. The state therefore could not be more mistaken than when it asserts that "the same constitutional distinction," Pet. Br. at 23, controls both the government's treatment of its *own* speech and the government's treatment of *private* speech.

This is not a case where the state is itself speaking or merely contracting with private agents to deliver the state's message. *Compare Rust v. Sullivan*, 500 U.S. 173 (1991). Washington does not purport to exercise any control over a student's choice of a major (other than to bar theology majors), as for example

[20]Given that the restriction here fails strict scrutiny, *supra* § I(B), it is unnecessary to decide whether the anti-religious viewpoint discrimination at issue is ipso facto unconstitutional, *cf. Good News*, 533 U.S. at 106 ("The restriction must not discriminate on the basis of viewpoint"), or "merely" triggers strict scrutiny, *cf. id.* at 112-13 (leaving question unresolved).

with a program exclusively designed to fund nursing degrees. Nor can the state reasonably argue that receipt of a Promise Scholarship somehow suddenly converts all of that student's classes into government speech. Not only is that claim outlandish on its own terms, but such a view would also make the state responsible for the religious instruction that Promise Scholars with nontheology majors receive from private institutions in classes outside their major. The state would be trading a defense against discrimination in this case for a bevy of Establishment Clause difficulties.

III. THE STATE'S RECOURSE TO INAPPOSITE LINES OF CASES IS MERITLESS.

A. The "Decline-to-Fund" Cases are Inapposite.

Washington mischaracterizes this case as an attempt to force the state to fund religious education. *See, e.g.*, Pet. Br. at i ("require the state to fund religious instruction"), 12 ("refusal to fund his degree in theology"), 23-24. This is incorrect. The real issue is: if a state chooses to award scholarships on an otherwise neutral basis to financially needy, academically gifted college students, to enable them to defray the expenses of a college education, may the state discriminatorily strip the scholarship from an otherwise eligible student just because that student declares a major in a religious subject taught from a religious viewpoint? As demonstrated above, such anti-religious, viewpoint-based discrimination is unconstitutional. Davey may not have a right to have the state pay for his education. But he does have a right not to have the state invidiously discriminate against him.

The state therefore cannot find warrant for its discrimination in the various cases which the government merely refused to subsidize the exercise of a right. *E.g.*, *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003). Respondent Davey does not dispute the state's prerogative to fund or not fund students in the pursuit of higher education at private colleges and universities. Once the state has undertaken such a program of aid to students, however, it may not invidiously discriminate against private choices on the basis of the religious viewpoints expressed therein. "[T]he First Amendment certainly has application in the subsidy context," *Finley*, 524 U.S. at 587, and "directed viewpoint discrimination . . . would prompt this Court to invalidate a statute on its face," *id.* at 583.

Thus, a state may decide to fund only a student's education prior to college; or to fund only students attending state schools; or to fund only students pursuing (for example) engineering degrees. Each of these would represent a religion-neutral, viewpoint-neutral parameter in a state program. Here, in stark contrast, the state has barred an otherwise eligible student, attending an otherwise eligible institution, pursuing an otherwise eligible major (theology), solely because that major is taught from a *religious* perspective. The state's criterion of exclusion -- religious viewpoint -- is simply incompatible with the federal constitutional protection of *private* religious choices and religious speech.

The cases the state relies on for its argument that the state is simply declining to fund the exercise of a right, Pet. Br. at 20, 24, are in no way inconsistent with the unconstitutionality of the discrimination at issue here. For example, were the state to fund private abortions or abortion counseling *except when undertaken for religious reasons* (*compare Maher*, *Harris*, and *Rust*), or give tax breaks for lobbying *except when the lobbying reflects a religious perspective* (*compare Regan*) or confer grants for artistic excellence *except when the art entails a religious viewpoint* (*compare Finley*), or condition federal discounts to

libraries on their screening out only Internet websites *with religious outlooks* (*compare Amer. Lib. Ass'n*), the invidious and unconstitutional discrimination would be clear. That is precisely the sort of invidious discrimination at issue here, and the *Maher/Regan* line of cases provides no shelter for such discrimination.

The state, Pet. Br. at 35, quotes *Norwood v. Harrison* for the proposition that a state could pursue religious neutrality "by withholding all state assistance," 413 U.S. at 462. In context, however, this Court was discussing the distinction between *private* and *public* schools, *id.*, not between private *secular* and private *religious* schools.

The state, Pet. Br. at 40, also quotes *Norwood*'s statement that a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools," 413 U.S. at 469. Of course, the state is not obligated to provide services to private schools *at all*. But that does not answer the question whether, when a state *does* provide aid to students attending religious colleges (as Washington does), it may do so in a religiously discriminatory manner. The 1973 decision in *Norwood* predates this Court's equal access jurisprudence (starting with *Widmar* in 1981) and important recent developments in educational assistance cases such as *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Nevertheless, one need not quarrel with the proposition that there are some limits even on the provision of neutral *services to religious schools*, to conclude nonetheless that religious-viewpoint-based discrimination in the provision of neutral *benefits to students*, especially in the admitted absence of any countervailing Establishment concerns, is simply intolerable under the Constitution.

B. <u>The Doctrine of Unconstitutional Conditions Leads to the Same Result.</u>

Washington devotes considerable effort to its argument that the anti-religious discrimination at issue here does not violate the "unconstitutional conditions" doctrine. *E.g.*, Pet. Br. at 26-32. This argument is largely beside the point, because the unconstitutionality of the restrictions at issue follows directly from the specific Free Exercise and Free Speech case law cited herein. *See supra* §§ I-II. There is no need for recourse to the more general "unconstitutional conditions" doctrine, which in the state's argument appears more a distraction than anything else. Nevertheless, it merits note that the state scheme at issue here fails constitutional muster under that doctrine, even on the state's own argument terms. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958) (discriminatory denial of benefit for engaging in certain speech is a restriction on that speech). The disqualifying restrictions at issue have "placed a condition on the *recipient* of the subsidy rather than on a particular program or service," Pet. Br. at 26 (internal quotation marks and citation omitted; emphasis in original): the *status* of the Promise Scholar -- as a declared theology major *vel non* -- is determinative, and the disqualification attaches even if the recipient exclusively uses his own personal funds for any religious instruction he receives. The state does not "limit[] the use of funds for the specific activity at issue," Pet. Br. at 27, but instead categorically disqualifies declared theology majors regardless of their course selection or their use of the state aid funds.[21]

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[21]The state is therefore incorrect when it says it "restricts only the type of instruction that the state . . . will underwrite." Pet. Br. at 27 n.7. On the contrary, the state restricts only *students* on the basis of their *status*, i.e., according to their declared *major* (and its viewpoint). A Promise Scholar with no declared major (or, say, a major in psychology) can take a

(continued...)

Washington concedes that "government cannot discriminate invidiously in its subsidies," Pet. Br. at 30 (internal quotation marks and citation omitted). That proposition suffices to dispose of the present case.

IV. THE STATE'S DISCRIMINATORY DISQUALIFICATION OF THEOLOGY MAJORS VIOLATES THE ESTABLISHMENT CLAUSE.

Just as the Free Exercise and Free Speech Clauses point solidly to the unconstitutionality of the state's express anti-religious discrimination here, so does Establishment Clause analysis lead to the same conclusion.

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). *Accord Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory treatment of religious activities "would demonstrate not neutrality but hostility toward religion." *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990). *Accord McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion").

Moreover, discriminatory treatment of religious instruction requires the censor to make a judgment about what is and is not religious. This creates additional constitutional problems of "entanglement":

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[21](...continued)
courseload *identical* to that of a declared theology major, yet only the latter student is disqualified from receipt of the scholarship. If that is not placing a condition on the recipient, *id.*, then nothing is.

> [state officials] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).

Thus, treating private *religious* choices in education on equal terms with private *secular* choices in education "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (emphasis in original; citation omitted).[22]

Here, the state denies equal treatment precisely to those persons who pursue a degree which the state (or its designated representative) deems "religious." This is diametrically opposed to Establishment Clause neutrality, and thus unconstitutional. *Accord McDaniel*, 435 U.S. at 636-42 (Brennan, J., concurring). "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Id.* at 641.

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[22]As noted earlier, *supra* pp. 7-8, the state delegates the definition of "theology" to the private colleges, presumably as an attempt to resolve the entanglement problem. But either the state must ultimately retain authority to review this determination, as the state regulations indicate, *see* WAC 250-80-100(1)(b) (JA 186) (HECB "shall be responsible for . . . (b) Determination of student eligibility"), or else the state is conceding it has no real interest in enforcing this provision.

V. THE STATE'S DISCRIMINATORY TREATMENT OF THEOLOGY MAJORS VIOLATES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause likewise forbids discrimination against the religious choices of private individuals. "At a minimum," governmental classifications "must be rationally related to a legitimate government purpose," while "classifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

A restriction on the private choice to pursue a religious degree taught from a *religious* viewpoint -- but not the private choice to pursue a religious degree taught from a *secular* viewpoint -- obviously represents a classification "affecting fundamental rights," namely, the rights to free speech and free exercise of religion. Moreover, the restriction incorporates the "inherently suspect distinction[]" of "religion," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Hence, strict scrutiny applies.

As demonstrated above, there is no compelling need to disqualify from the Promise Scholarship program those students, and only those students, who personally choose to declare an intent to obtain a degree in theology taught from a religious perspective. Nor is the restriction at issue narrowly tailored to any asserted state interest. Indeed, the arbitrary and selective disqualification of those pursuing theology majors taught from a *religious* viewpoint could only "rest on an irrational prejudice." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) -- in this case, a bias against religion as such -- which would "fail rationally to justify singling out" religious speech for special restrictions, *cf. id. Accord Widmar*, 454 U.S. at 281 (Stevens, J., concurring in judgment) (perceiving no valid reason to exclude religious worship where comparable secular discussions are allowed).

Finally, the hostile targeting of the viewpoint of speech denies

the equal protection of the laws under this Court's decisions recognizing that the same nondiscrimination norms govern both the Free Speech Clause, *see supra* § II, and the Equal Protection Clause. *See Police Dep't v. Mosley*, 408 U.S. 92, 94-99 (1972); *Carey v. Brown*, 447 U.S. 455, 461-63 (1980); *RAV v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992).

CONCLUSION

Just as "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity," *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003), so must such "pivotal" education, *id.*, be accessible to all individuals regardless of religion. Thus, when a state adopts a scholarship program to support students seeking higher education at private colleges and universities, that state program must remain free from invidious state discrimination against private religious choices and private religious viewpoints. The Ninth Circuit correctly concluded that Washington ran afoul of that constitutional norm when it disqualified Joshua Davey from a state scholarship, to which he was otherwise entitled, solely because he declared a major that included theology taught from a religious viewpoint.

This Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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